BANK BUMIPUTRA MALAYSIA BERHAD & ANOR. v. LORRAIN ESME OSMAN

BANK BUMIPUTRA MALAYSIA BERHAD & ANOR. v. LORRAIN ESME OSMAN & ORS.

[O.C.J. (Zakaria Yatim J.) December 15, 1986]

[Kuala Lumpur – Civil Suits Nos. C138 & C438 of 1985]

Company law – Directors – Liabilities of – Breach of fiduciary duties of company directors – Loss and damage suffered by company – Claim by company for loss against directors – Companies Act, 1965, s. 132(3) – Contracts Act, 1950, s. 169.

Conflict of laws – Judgment obtained in Hong Kong against borrower of loan – No satisfaction – Whether lender and its parent company can claim against directors of lender and parent company – Breach of fiduciary duties – Merger – Whether Hong Kong law or Malaysia law applicable – Whether plaintiffs can maintained present actions in Malaysia.

Practice and Procedure – Striking out writ and statement of claim – No reasonable cause of action – Vexatious and abuse of the process of court – Stay of proceedings – Natural forum or forum conveniens – Delay in making applications – R.H.C. 1980, O.18, r.19.

Lorrain Esme Osman (Lorrain) is a defendant in both these civil suits filed by the plaintiffs, Bank Bumiputra Malaysia Bhd. (the Bank) and its wholly owned subsidiary company Bumiputra Malaysia Finance Ltd. (BMF), which was incorporated in Hong Kong. In his two similar applications, he seeks orders of the court to strike out the writs of summons and statements of claim in both suits on the ground that each of the statements of claim discloses no reasonable cause of action and/or is vexatious and/or is an abuse of the process of the court. Alternatively, he asks the court to stay all proceedings in respect of both Civil Suits on the ground that the courts of Hong Kong are the natural forum and/or forum conveniens before which the actions should be tried and the continuance of the actions before the High Court of Malaya would be vexatious and/or an abuse of the process of the court. In Civil Suit C438 of 1985, Lorrain also asks the Court that, if it does not strike out or stay the action, the following questions or issues should be tried before all other questions or issues in the action, namely:

(a) Whether the law applicable to the substantive matters in issue in these proceedings is that of Hong Kong or Malaysia or both?

(b) Whether under the relevant law so found to be applicable:

  (i) the first plaintiff (the Bank) by virtue of its holding the majority of the shares in the second plaintiff (BMF), a company incorporated in Hong Kong, can maintain an action for alleged wrong done or for alleged damage caused to the property of BMF; and

  (ii) by reason of the matters set out in paragraphs 56, 58 and 59 of Lorrain's statement of defence, can the plaintiffs maintain the present action in Civil Suit C438.

These questions were raised in an earlier application by the second defendant in the same Civil Suit No. C438 of 1985, in which the court ruled that the law applicable was the law of Malaysia (see [1987] 1 M.L.J. 502).

It was contended on behalf of the plaintiffs that Lorrain's applications in both civil suits to strike out the writs and statements of claim and for stay of proceedings were not made promptly. The plaintiffs have reasonable causes of action founded on his breach of his fiduciary duty as a director in both suits which should be tried in Malaysia and not in Hong Kong.

Held, dismissing both applications with costs: (1) the applications to strike out the writs and statements of claim and for stay of proceedings in both suits were dismissed;

(2) the law applicable to the substantive matters in issue in these two proceedings is the law of Malaysia;

(3) in respect of Civil Suit C438, the plaintiffs could maintain the present action. The doctrine of merger does not apply.

Cases referred to:

(1) *Bank Bumiputra Malaysia Bhd. & Anor.* v. *Lorrain Esme Osman* [1986] 1 M.L.J. 426.
(2) *Coupland* v. *Arabian Gulf Petroleum Co.* [1983] 2 All E.R. 434, 437 & 442.
(3) *Bank Bumiputra Malaysia Bhd. & Anor.* v. *Lorrain Osman & Ors.* [1985] 2 M.L.J. 236.
(4) *Lister* v. *Stubbs* (1890) 45 Ch. D.1.
(5) *Selangor United Rubber Estate Ltd.* v. *Cradock* (No. 3) [1968] 2 All E.R. 1073.
(6) *English* v. *Dedham Vale Properties Ltd.* [1978] 1 All E.R. 382, 398.
(7) *Hussey* v. *Palmer* [1972] 3 All E.R. 744.
(8) *Regal (Hastings) Ltd.* v. *Gulliver & Ors.* [1942] 1 All E.R. 378.
(9) *Industrial Development Consultants Ltd.* v. *Cooley* [1972] 1 W.L.R. 443.
(10) *Golden Century Development Sdn. Bhd. & Anor.* v. *Ganhoe & Anor.* [1983] 1 M.L.J. 86.
(11) *New Straits Times (Malaysia) Bhd.* v. *Kumpulan Kertas Niaga Sdn. Bhd. & Anor.* [1985] 1 M.L.J. 226.
(12) *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.* [1936] 1 K.B. 382.
(13) *Atlantic Star* v. *Bona Spes* [1974] A.C. 436.
(14) *Rockware Glass Ltd.* v. *MacShannon* [1978] A.C. 795.
(15) *Trendtex Trading Corporation & Anor.* v. *Credit Suisse* [1980] 3 All E.R. 721, 734.
(16) *European Asian Bank A.G.* v. *Punjab and Sind Bank* [1982] 2 Lloyd's R. 356.
(17) *Chellaram & Ors.* v. *Chellaram & Ors.* [1985] 1 All E.R. 1043.
(18) *Bank of Tokyo Ltd.* v. *Karoon & Anor.* [1986] 3 W.L.R. 414.
(19) *Muduroglu Ltd.* v. *T.C. Ziraat Bankasi* [1986] 3 W.L.R. 606.
(20) *The "Lung Yung"* [1984] 1 M.L.J. 29.
(21) *Isaacs & Sons* v. *Salbstein & Anor.* [1916] 2 K.B. 139.
(22) *Goldrei, Foucard & Son* v. *Sinclair* [1918] 1 K.B. 180.

APPLICATIONS.

T. Thomas for the plaintiffs/respondents in both suits.

Colin Ross-Munro Q.C. (*M. Anad Krishnan* with him) for the defendant/applicant in Civil Suit C138 of 1985 and the 2nd defendant/applicant in Civil Suit C438 of 1985.

Cur. Adv. Vult.

Zakaria Yatim J.: There are two similar applications in Civil Suit C138 of 1985 (C138) and in Civil Suit C438 of 1985 (C438). Both these applications were filed by Lorrain Esme Osman (Lorrain) who is a defendant in both civil suits.

In these applications, Lorrain is seeking the order of the Court to strike out the writs of summons and statements of claim in both civil suits on the ground that each of the statement of claim discloses no reasonable cause of action and/or is vexatious and/or is an abuse of the process of the Court. Alternatively, he is asking the Court to stay all proceedings in respect of both civil suits on the ground that the Courts of Hong Kong being the natural forum and/or *forum conveniens* before which the actions should be tried and the continuance of the actions before the High Court of Malaya would be vexatious and/or an abuse of the process of the Court. In C438 Lorrain is also asking the Court that, if the Court does not strike out or alternatively stay the action, the following questions or issues should be tried before all other questions or issues in the action namely:

(a) Whether the law applicable to the substantive matters in issue in these proceedings is that of Hong Kong or Malaysia or both?

(b) Whether under the relevant law so found to be applicable:

(i) the first plaintiff (the Bank) by virtue of its holding the majority of the shares in the second plaintiff (BMF), a company incorporated in Hong Kong, can maintain an action for alleged wrong done or for alleged damage caused to the property of BMF, and

(ii) by reason of the matters set out in paragraphs 56, 58 and 59 of Lorrain's statement of defence, can the plaintiffs maintain the present action in C438.

It should be mentioned here that the additional prayers set out by Lorrain in his application in C438 are similar to those contained in the application of the second defendant, Dato' Mohd: Hashim Shamsuddin (Hashim) in the same suit. Hashim's application was argued before me and my judgment was delivered on September 4, 1986.

In that judgment I decided that the law applicable to the substantive matters in issue in C438 is the law of Malaysia. My decision is the same in respect of the question on applicable law raised by Lorrain.

With regard to question (b)(i), my answer is the same as that in the same judgment. In that judgment, I stated that the Bank, by virtue of its holding the majority shares in BMF could not maintain an action against Hashim for alleged wrong done or for alleged damaged caused to the property of BMF. In fact I stated that the question was irrelevant and meaningless. The Bank is not suing Hashim on the basis that it holds all the shares in BMF. Mr. Ross-Munro, counsel for Lorrain, said in his submission that he agreed with my decision on this point.

On the question of whether the plaintiffs can maintain the present application in C438, Mr. Ross Munro told the Court that he would be raising a new point which was not covered by Hashim's application, namely the question of merger. I shall deal with this question later on.

I now turn to Lorrain's applications to strike out the writs of summons and statements of claims in both civil suits and alternatively, for stay of proceedings on the ground that the Courts in Hong Kong being the natural forum.

Mr. T. Thomas, counsel for the plaintiffs submitted that Lorrain's applications in both civil suits to strike out the writs and statements of claim and for stay of proceedings were not made promptly. He said that there was considerable delay in filing the said applications. He urged the Court that on this ground alone the applications should be dismissed.

It is necessary for me to examine the question of delay in filing the two applications. In C138, the writ was filed on January 10, 1985. On February 5, 1985, the plaintiffs filed an application to serve the writ on Lorrain by substituted service. On February 8, 1985, the Senior Assistant Registrar granted leave to serve the writ by substituted service. Lorrain filed a conditional appearance on

March 1, 1985 and applied by summons in chambers to set aside service of writ and the order granting leave to serve by substituted service. On May 3, 1985, his application was heard by me and on September 11, 1985 I delivered a written judgment dismissing his application (See *Bank Bumiputra Malaysia Bhd. & Anor.* v. *Lorrain Esme Osman*[1]). He appealed against my decision to the Supreme Court but the Supreme Court dismissed his appeal on November 1, 1985 and ordered Lorrain to file his defence within twenty-one days of the order. (See Supreme Court No. 302/85). On November 21, Lorrain filed his statement of defence. On January 24, 1986 I granted the usual orders on the hearing of summons for directions. Trial dates for the action were fixed between July 1 and July 25, 1986. On May 29, 1986 the trial dates in July were vacated on Lorrain's application. New trial dates were fixed for November 3 – November 28, 1986. Lorrain's present application was filed on March 18, 1986.

In C438, the plaintiff filed their writ and statement of claim against Lorrain and the other three defendants on January 26, 1985. On May 23, Lorrain entered conditional appearance. On December 26, 1985, he filed his statement of defence. The plaintiffs' reply to Lorrain's defence was filed on September 11, 1986. The present application was filed on March 18, 1986.

With regard to Lorrain's applications to strike out the writs of summons and the statements of claim in both civil suits, it was not disputed that the applications were made under Order 18 rule 19 of the Rules of the High Court, 1980. Order 18 rule 19 states:

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleadings or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case, may be, were a pleading."

The rule does not specify a time limit during which a party may apply to the Court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The Court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice*, 1985, v.1, page 304.

Lorrain's present application to strike out the writ of summons in C138 must be refused as the case was set down for trial on two occasions. With regard to the similar application in C438, it is clear that application can be heard by this Court.

I now turn to his application for stay of proceedings on the ground that the Courts in Hong Kong being the natural forum. In my opinion his applications for stay in both C138 and C438 were made far too late. He should have filed his applications at the early stages of the proceedings. In the circumstances the Court has the discretion to refuse his applications for stay. See *Coupland* v. *Arabian Gulf Petroleum Co.*[2] Mr. Ross-Munro submitted that the period of delay was one of four months between November 1985 and March 1986. According to him in *Coupland's* case, the delay was eight months. In my view even a four months period was a long delay for the purpose of applying for a stay. Lorrain had the services of his own solicitors in this country all the time and if he was serious in applying for a stay, I fail to understand why he did not file his applications much earlier.

Assuming that Lorrain had filed his applications promptly, the question is whether there are merits in his applications?

With regard to Lorrain's application to strike out the writ and statement of claim in C138, I have already made my ruling in my judgment dated April 26, 1985 (see *Bank Bumiputra Malaysia Bhd. & Anor.* v. *Lorrain Osman & Ors.*[3]), that the plaintiffs in C138 "have a strong *prima facie* case against Lorrain." There are several causes of action in that suit. First, Lorrain was acting in breach of his fiduciary duty as director of the Bank and as Chairman of BMF. Secondly, Lorrain received the sum of M$27,652,853.06 by virtue of his position as director of the Bank and Chairman of BMF and accordingly as agent of the Bank and BMF. The plaintiffs are therefore entitled to claim from him the said sums under section 169 of the Contracts Act, 1950. Thirdly, Lorrain did not use reasonable diligence in the dis-

charge of the duties of his office as director of the Bank and accordingly he is liable to the Bank under section 132(2) of the Companies Act, 1965 for all profits made by him as a result of his actions. Fourthly, Lorrain was in breach of his duties as Chairman of the Board of Directors of the BMF and is, therefore, liable to BMF in common law for all damages suffered by BMF as a result of the breach.

With regard to C438, I have also made a ruling in my judgment dated September 4, 1986.[3] One of the issues for me to consider in that judgment was whether by reason of the matters set out in paragraph 33A of the amended defence of Hashim can the plaintiff maintain the present action in C438? My answer to this question was in the affirmative. Although that judgment was in respect of Hashim's application, in my view my ruling in that judgment applies to Lorrain as well. In that judgment I considered the statement of claim and came to the conclusion that there were at least three causes of action against Hashim and the other defendants, including Lorrain. The first cause of action is that Hashim and the other defendants, including Lorrain, were in breach of their fiduciary duties to the Bank and BMF as a result of which the plaintiff suffered loss and damages. The second cause of action is fraudulent misrepresentation by Hashim and the other defendants, including Lorrain. The third cause of action is for damages suffered by the plaintiffs as a result of the alleged breach of duties as directors/officers by Hashim and the other defendants, including Lorrain and, therefore, recoverable by the plaintiffs under common law.

Mr. Ross-Munro, in his submission, referred to the question of assignment. He referred to the deed of assignment dated December 31, 1983 between BMF and the Bank (the first assignment) and to the deed of assignment dated September 17, 1984 between the Bank and Petroleum Nasional Berhad (Petronas), (the second assignment). According to him, by virtue of the two assignments, the plaintiffs have no cause of action in C138 and C438. I have already dealt with the question of assignment in my judgment dated September 4, 1986. In that judgment I said ([1987] 1 M.L.J. 509, 510):

"In my opinion under both assignments the plaintiffs have not waived, exonerated or excused Hashim from alleged breaches of duty complained of against him in the statement of claim. As Mr. Thomas has rightly told the Court the plaintiffs' causes of action were personal claims involving personal obligations of Hashim to the Bank and BMF. In *Trendtex Trading Corporation and Another* v. *Credit Suisse* ([1982] A.C. 679) Lord Roskill, in his judgment at page 702 said, '... causes of action which were essentially personal in their character, such as claims for defamation or personal injury, were incapable of assignment ...' In my view this passage states the correct position of the law."

The above passage applies also in respect of C138.

Mr. Ross-Munro next referred to prayer A(1) and prayer B(1) in C138 where the plaintiffs are saying that Lorrain received the M$27,652,853.06 as constructive trustee for the Bank and BMF. He submitted that in order to succeed in establishing that Lorrain received the money as constructive trustee the plaintiffs must show: (1) that the M$27,652,853.06 belonged to the plaintiffs; (2) that the money was impressed with trust; and (3) that Lorrain received the money with the knowledge that he received it in breach of trust. According to Mr. Ross-Munro, the M$27,652,853.06 was not the Bank's money; the sum was not impressed with trust; and Lorrain could not have received the money with the knowledge that he received the money in breach of trust. He submitted that Lorrain did not receive the money as constructive trustee. Indeed he contended that the question of constructive trustee did not arise. He cited *Lister* v. *Stubbs*[4] in support of his contention.

In considering the question of constructive trustee in the context of the statement of claim in C138, it is necessary to examine the law relating to this matter.

According to *Halsbury's* Laws of England, (4th Ed.) vol. 48 at page 325, "A trustee's liability is a personal liability to account alone where by reason of the fiduciary relationship he obtained a personal advantage for himself by way of a bribe or a commission." In *Selangor United Rubber Estate Ltd.* v. *Cradock (No. 3),*[5] Ungoed-Thomas J. distinguished two different kinds of constructive trustee. At page 1095 of his judgment, the learned judge said:

"(i) Those, who, though not appointed trustees, take on themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account for any failure in the duty so assumed) and so their status as trustees precedes the occurrence which may be the subject of claim against them. (ii) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and

not for the beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of."

The learned judge went on to state at page 1097:

"It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship (which is the only category with which we are concerned) is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee.

He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions."

The second passage quoted above was cited with approval by Slade J. *in English* v. *Dedham Vale Properties Ltd.*[6] Before quoting the passage Slade J. said, "I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed ..." Earlier on his judgment, Slade J. said, "The liability to account would ... arise if ... the relationship was in the eyes of equity a fiduciary one in the sense that it imposed relevant fiduciary duties on the defendants towards the plaintiff ..." See also *Hussey* v. *Palmer.*[7]

There are two other authorities cited by Mr. Thomas on constructive trusteeship. These two cases are important authorities as they are company law cases.

The first case is *Regal (Hasting) Ltd.* v. *Gulliver and Others.*[8] This is a House of Lords case. In his judgment at page 381, Viscount Sankey said:

"As to the duties and liabilities of those occupying such a fiduciary position, a number of cases were cited to us which were not brought to the attention of the trial judge. In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of *mala fides*. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his *cestui que trust.*"

In the same case, Lord Russell stated at page 386:

"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of *bona fides;* or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

Lord Wright also held a similar view. He said at pages 392 and 393:

"However, I think the answer to this reasoning is that, both in law and equity, it has been held that, if a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damnified or has lost a profit which otherwise he would have got. The fact is in itself a fundamental breach of the fiduciary relationship. Nor can the court adequately investigate the matter in most cases. The facts are generally difficult to ascertain or are solely in the knowledge of the person who is being charged. They are matters of surmise; they are hypothetical because the inquiry is as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage, if, in short, interest had not conflicted with duty ... Thus, to take a familiar instance, in *Boston Deep Sea Fishing & Ice Co.* v. *Ansel* (1888), 39 Ch.D. 339, the defendant was held liable to account to the plaintiff company of which he was director for secret bribes or bonuses which he had received from persons making contracts with the company. The defendant's liability flowed from the fiduciary relationship in which he stood to the company as its agent."

It should be noted here that Lord Wright also referred to *Lister* v. *Stubbs, supra.*, which was relied upon by Mr. Ross-Munro. In his judgment at page 393 Lord Wright said, "As it was held in *Lister & Co.* v. *Stubbs* (1890), 45 Ch.D.1, the relationship in such a case is that of debtor and creditor, not trustee and *cestui que trust.*"

The second case is *Industrial Development Consultants Ltd.* v. *Cooley.*[9] In that case the defendant, an architect was a managing director of the plaintiff company. The defendant's duties included procuring new business for the plaintiff company particularly in connection with the gas industry. The plaintiff company had been interested in a project by the Eastern Gas Board to construct four depots. Unsuccessful negotiations took place between the defendant, on behalf of the plaintiff company and the board. Subsequently, the deputy chairman of the board approached the defendant for advice in his private capacity about the affairs of the board. The defendant realised that if he could obtain a release from the plaintiff company he would have a good chance of

obtaining for himself a valuable contract from the board. At this meeting with the deputy chairman, the defendant acquired knowledge and information not possessed by the plaintiff company and which the plaintiff company would have wished to possess. The defendant then obtained his release from the plaintiff company by representing dishonestly that he was in ill health. The plaintiff company would not have agreed to release him if they had known the full facts about the board's projects. The defendant was subsequently given the contract by the board as a result of work which, unknown to the plaintiff company, he had done while still the managing director of the plaintiff company. The Court held that it was an over-riding principle of equity that a man would not be allowed to place himself in a position in which his fiduciary duty and his interests conflicted, and that throughout May, June and July 1969 the defendant was in a fiduciary relationship with the plaintiffs since he was then their managing director, and accordingly information which came to him on June 13, which was of concern to the plaintiffs and relevant for them to know, was information which it was his duty to pass on to them; and that when he began his course of dealing with the gas board he embarked upon a deliberate policy and course of conduct which put his personal interest as a potential contracting party with the board in direct conflict with his pre-existing and continuing duty as managing director of the plaintiffs thereby rendering him accountable to the plaintiffs. In his judgment in that case (page 453), Roskill J. (as he then was) said:

"The remarkable position then arises that if one applies the equitable doctrine upon which the plaintiffs rely to oblige the defendant to account, they will receive a benefit which, on Mr. Smettom's evidence at least, it is unlikely they would have got for themselves had the defendant complied with his duty to them. On the other hand, if the defendant is not required to account he will have made a large profit, as a result of having deliberately put himself into a position in which his duty to the plaintiffs who were employing him and his personal interests conflicted. I leave out of account the fact that he dishonestly tricked Mr. Hicks into releasing him on June 16 although Mr. Brown urged that that was another reason why equity must compel him to disgorge his profit. It is said that the plaintiffs' only remedy is to sue for damages either for breach of contract or may be for fraudulent misrepresentation. Mr. Brown has been at pains to disclaim any intention to claim damages for breach of contract save on one basis only, and he has disclaimed specifically any claim for damages for fraudulent misrepresentation. Therefore, if the plaintiffs succeed they will get a profit which they probably would not have got for themselves had the defendant fulfilled his duty. If the defendant is allowed to keep that profit he will have got something which he was able to get solely by reason of his breach of fiduciary duty to the plaintiffs. When one looks at the way the cases have gone over the centuries it is plain that the question whether or not the benefit would have been obtained but for the breach of trust has always been treated as irrelevant. I mentioned *Keech* v. *Sanford* a few moments ago and this fact will also be found emphasised if one looks at some of the speeches in *Regal (Hastings) Ltd.* v. *Gulliver* (Note) [1967] 2 A.C. 134 though it is true, as was pointed out to me, that if one looks at some of the language used in the speeches in *Regal* such phrases as 'he must account for any benefit which he obtains in the course of and owing to his directorship' will be found."

At the end of his judgment, Roskill J. made, *inter alia*, the following order: "Declaration defendant trustee for plaintiffs of profits of his contracts with Eastern Gas Board relating to his appointment as project manager of four projects."

From the authorities cited above, I find tht the plaintiffs are entitled to seek a declaration that Lorrain received the sum of M$27,652,853.06 as constructive trustee for them.

In my opinion the plaintiffs have shown that they have reasonable causes of action in C138 and C438. It is only in plain and obvious cases that the court would strike out a statement of claim. I think this is the correct position of the law and Mr. Ross-Munro also agreed that the Court can strike out a statement of claim only in plain and obvious cases. See *The Supreme Court Practice, supra.*, p. 305. Order 18 rule 19(1)(a) refers to a "reasonable cause of action." A reasonable cause of action means a cause of action with some chance of success. So long as the statement of claim discloses some cause of action, or raises some question fit to be decided by a judge, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out. *Ibid.* p. 306. The Court may, however, strike out the statement of claim if it is "obviously unsustainable." *Golden Century Development Sdn. Bhd. and Anor.* v. *Ganhoe and Anor.*[10] See also *New Straits Times (Malaysia) Bhd.* v. *Kumpulan Kertas Niaga Sdn. Bhd. and Anor.*[11] A case which is obviously unsustainable may also be described as a case which is obviously frivolous or vexatious. *Supreme Court Practice, op. cit.* p. 312.

In my judgment the plaintiffs' claim in each of the two civil suits, C138 and C438, discloses reasonable causes of action. The claims are not obviously unsustainable or obviously frivolous or vexatious; and neither are the claims an abuse of the process of the Court. On the other hand the plaintiffs have a good case in each of the civil suits. In the circumstances Lorrain's applications

to strike out the writs and statements of claim in both civil suits must fail.

I shall next turn to Lorrain's applications for stay of all proceedings in both civil suits on the ground that the Courts of Hong Kong being the natural forum. The question for the Court to determine, therefore, is whether this Court or the Court in Hong Kong is the natural forum for the trial of the two civil suits. In order to determine this question it is necessary to examine the law on this point.

The law on this point has developed in England over the years. I shall start with the case of *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.*[12] In that case the Court decided that a mere balance of convenience was not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court. The Court laid down two requirements to be satisfied in order to justify a stay. Firstly, the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court. Secondly, the stay must not cause injustice to the plaintiff. The burden of proving both requirements was on the defendant. Looking at these requirements, it would be extremely difficult for a defendant to get a stay in England especially when he had to prove that the action in England was oppressive or vexatious.

Almost four decades later, the English Court began to change their attitude gradually on the question of forum of convenience.

Perhaps the landmark case was the decision of the House of Lords in *Atlantic Star* v. *Bona Spes.*[13] In that case Lord Reid said the words "oppresive or vexatious" should be interpreted more liberally. The House of Lords decided that the Court must take into account not only any advantage to the plaintiff but also any disadvantage to the defendant.

The next case was *Rockware Glass Ltd.* v. *MacShannon.*[14] In that case Lord Diplock, Lord Salmon and Lord Frazer decided not to rely on the test that the action should be oppressive or vexatious. Lord Salmon in his judgment at page 819 said, "To my mind, the real test of stay or no stay depends upon what the Court in its discretion considers that justice demands." Lord Frazer, Lord Russell and Lord Keith also applied the same test. In the same case, Lord Keith, at page 826, said, "where ... England is the natural forum for the action, it is incumbent upon the defendant, in order to secure a stay, to show that he will suffer very serious disadvantages there and that the plaintiff will suffer no injustice in being required to resort to a different forum."

The principles laid down by the House of Lords in *Rockware Glass* v. *MacShannon, supra.*, had been stated by Robert Goff J. (as he then was) in his judgment in *Trendtex Trading Corporation and Another* v. *Credit Suisse.*[15] "Firstly, the real test of stay depends on what the Court, in its discretion considers that justice demands. Secondly, the Court must first consider whether there is another jurisdiction which is clearly more appropriate than England for the trial of the action. Such a jurisdiction has been called the "natural or appropriate forum," or the "natural forum." The Court looks for another forum which is clearly more appropriate, because the Court will not lightly stay an action properly commenced in England. Since the jurisdiction of the English Court has been competently involved a stay should not be granted without good reason. The burden rests on the defendant to prove the existence of such other jurisdiction. In considering whether there is another jurisdiction which is clearly more appropriate the Court will consider all the circumstances of the particular case, including, for example, where the cause of action arose, the connection of parties with any particular jurisdiction, the applicable law, the availability of witnesses and the saving of costs. Thirdly, if the Court concludes that there is another clearly more appropriate jurisdiction, then two slightly different tests have been adumbrated. (a) A stay will be granted unless the plaintiff shows that a stay would deprive him of a legitimate personal or judicial advantage available to him in England. (b) The burden of proof remains on the defendant. If he can show that trial in England would afford the plaintiff no real advantage, it would be unjust to refuse a stay. But if trial in England would offer the plaintiff a real advantage, then a balance must be struck and the Court must decide in its discretion whether justice demands a stay. On either test the Court will only consider advantages to the plaintiff which are real, that is, objectively demonstrated. Fourthly, if the Court concludes that there is no other clearly more appropriate jurisdiction, then a stay might be granted. Such a case must surely be very rare." Robert Goff J. applied these principles to the facts before him and granted a stay. His decision

was upheld by the Court of Appeal and subsequently approved by the House of Lords.

The principles laid down by the House of Lords in *Rockware Glass* v. *MacShannon, supra.* as stated by Robert Goff J., were applied in *European Asian Bank A.G.* v. *Punjab and Sind Bank,*(16) *Chellaram and Others* v. *Chellaram and Others,*(17) and in *Bank of Tokyo Ltd.* v. *Karoon and Another.*(18)

The *Bank of Tokyo's* case is one of the two recent cases decided by the English Court of Appeal. In that case Robert Goff L.J. (as he then was) said at pages 17 and 18:

"... it is now recognised that the principle applicable in the case of a stay of foreign proceedings is indistinguishable from the Scottish principle of forum non conveniens. This latin tag is, like many others, misleading: proceedings in the English forum are stayed not because England is an inconvenient forum, but because there is another clearly more appropriate forum abroad ... It follows that ... where there is another clearly more appropriate forum ... a balance must be struck and the Court must decide in its discretion whether justice requires a stay ..."

Robert Goff LJ said that the principles laid down in *Rockware Glass's* case *supra* were the correct principles.

The other case decided by the English Court of Appeal recently is *Muduroglu Ltd.* v. *T.C. Ziraat Bankasi.*(19) In that case, Mustill L.J., at page 17 of his judgment, said,

"Thus the enquiry begins with the search for the natural forum. If the answer is found to be the foreign court is the natural forum, the enquiry stops there ... But if the English Court is found to be the natural forum the critical equation is brought into play."

The cases cited above show the development of the law relating to forum of convenience in England. In Malaysia, this area of the law has not been developed yet. Mr. Thomas cited one Malayan case which appears to be the only reported case decided in Malaysia so far. The case is *The "Lung Yung".*(20) In that case the cases before the learned judge were the earlier cases *viz., The Atlantic Star supra.* and *St. Pierre's* case, *supra.* The learned judge granted a stay in that case on the grounds, *inter alia,* that the defedants had not succeeded in satisfying the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to them. The decision of the learned judge was upheld by the Federal Court. In my view the test laid down in *St. Pierre's* case is no longer applicable in England and the law has developed to a great extent since the decision in The *Atlantic Star's* case.

Mr. Ross-Munro submitted that in the present case, the Court should apply the following tests:—

(1) The Court looks to see which is the natural forum, that is, the forum with which the action has the most real and substantial connection.

(2) If the natural forum is the foreign court, then the enquiry stops there and an order for stay of proceedings granted.

(3) If the natural forum is the Malaysian Court then the critical equation comes into place and the court has to decide whether the disadvantages to the defendant in litigating in Malaysia substantially outweigh the legitimate political and judicial advantages of the plaintiff in litigating in a Malaysian Court.

With respect, I am unable to adopt the tests as stated by Mr. Ross Munro. His formula did not take into account the emphasis on "injustice" in the *Rockware Glass's* case. In my opinion the correct principles to be applied in the present case are the principles laid down by the House of Lords in the *Rockware Glass's* case and stated by Robert Goff J. in *Trendtex's* case.

I shall now examine the facts in order to determine whether a stay should be granted. I shall first deal with the facts in C138. The Bank is a Malaysian Bank. BMF, though a company registered in Hong Kong, is in fact wholly owned by the Bank. Lorrain is the Bank's nominee on the board of directors of BMF. He could not be the chairman of the BMF board of directors without being the Bank's nominee. Lorrain is a Malaysian citizen and until he left for England in November, 1984, he was at all material times resident in Kuala Lumpur. He is domiciled in Malaysia. Lorrain received the sum of M$27,652,853.06 as secret profits through two firms of Malaysian solicitors in Kuala Lumpur. Lorrain's known assets are all in Malaysia.

I shall next deal with the facts in C438. Here again the Bank is a Malaysian Bank and BMF is wholly owned by the Bank. Lorrain is a Malaysian Citizen and until he left for England he was at all material times resident in Kuala Lumpur. He is domiciled in Kuala Lumpur. Hashim was at all material times an executive director and a member of the board of directors of the Bank. He is a Malaysian Citizen and until he left for England in November, 1984 he was residing in Kuala Lumpur.

The third defendant, (Rais), who was one of the directors of BMF was an employee of the Bank and held the position of the Senior General Manager of the International Banking Division of the Bank. The fourth defendant, Ibrahim Jaafar is also a Malaysian Citizen. He was an employee of the Bank at all material times. Indeed the Bank could recall him anytime. The Bank appointed five Malaysians, resident in Malaysia, to be in the Supervisory Committee. The Supervisory Committee held all its meetings in Kuala Lumpur. When the Carrian Nominee Ltd. (CNL) applied for a US$40 million loan, the application was considered by the Supervisory Committee. The application was rejected by the Supervisory Committee. Despite the decision of the Supervisory Committee, the defendants, through BMF, granted loans to CNL and the monies that were lent out to CNL came from the Bank. The alleged fraudulent misrepresentation was carried out in Kuala Lumpur.

From the facts just stated, I have no doubt that Malaysia is the natural forum for the trial of the two actions in C138 and C438. Indeed, in the circumstances of this case, Malaysia is a more appropriate forum and since both the civil suits had been properly commenced in Malaysia in January 1985 this Court will not lightly stay both the actions. See *Trendtex's* case *supra.* at page 734.

The question that arises now is what are the disadvantages if a stay is granted? First, the plaintiffs in C138 had obtained Mareva Injunctions against the known assets of Lorrain in Malaysia. The applications to set aside the Mareva injunction had been dismissed by this Court. An appeal against the order of this Court was dismissed by the Supreme Court on December 10, 1986, in C.A. 212/85. The Mareva Injunctions provide a form of security for the plaintiffs as Lorrain will not be able to dispose of his assets without the leave of the Court. Secondly, the plaintiffs will have to bear extra costs if a stay is allowed. Since the filing of the two suits, there have been four complex interlocutory proceedings. The plaintiffs must have spent a great deal of money in respect of these interlocutory proceedings. Thirdly, if stay is granted and assuming the plaintiffs will succeed in both actions in Hong Kong, all the plaintiffs will get is a "paper judgment." There is no evidence that Lorrain has assets in Hong Kong. Fourthly, the question of delay. C138 is ready for trial in this Court. In respect of C438, it will not be long before a trial date is fixed. All these efforts will be wasted if the plaintiffs have to commence the two actions afresh in Hong Kong. It may take a number of years before the two cases are disposed of in Hong Kong. Fifthly, most of the witnesses for the plaintiffs are in Malaysia.

If stay is refused, there is only one disadvantage for Lorrain that is he has to bring his witnesses from Hong Kong. I do not think Lorrain needs to bring from Hong Kong as many witnesses as described by Mr. Ross Munro.

It should be observed here that at the time of the hearing of these applications, Lorrain was resisting an application by the Hong Kong Government to extradite him from England to Hong Kong. Therefore, on the one hand, he is resisting an application to bring him to Hong Kong to face several criminal charges against him. Yet in these applications he is anxious to have the two actions tried in Hong Kong.

Finally, I should mention here that in C438, Lorrain's application is not supported by the other defendants. An Advocate and Solicitor in Kuala Lumpur, Mr. V.T. Ravindran affirmed an affidavit stating that if stay is granted he would advise Hashim to be bound by the order for stay. Mr. Ravindran, however, admits that he affirmed the affidavit without instructions from Hashim. With regard to Rais, he is known to be residing in Paris. There is no extradition proceeding to extradite him to Hong Kong. It is not likely that Rais would want to contest these two civil suits in Hong Kong, when he is fully aware that he is wanted by the Hong Kong Police.

In my judgment, in view of the circumstances in this case, *justice demands* that both actions in C138 and C438 should be tried in Malaysia and accordingly, Lorrain's applications for stay of proceedings on the ground that the Courts in Hong Kong being the natural forum should be refused.

I shall now deal with the additional prayers in Lorrain's application in C438.

In prayer 2(a), Lorrain asks the Court to decide whether the law applicable to the substantive matters in issue in these proceedings is that of Hong Kong or Malaysia or both? In my judgment dated September 4, 1986 in respect of Hashim's application, I ruled that the applicable law is the law of Malaysia. My answer to the question posed by Lorrain is also the same.

Prayer 2(b)(i) is the same as the prayer in Hashim's application. My answer to that prayer

is found in the same judgment. Mr. Ross Munro said that he agreed with my decision in that judgment in this respect.

With regard to prayer 2(b)(ii), Mr. Ross Munro raised a new ground, that is the doctrine of merger. In prayer 2(b)(ii) Lorrain asks the Court to determine whether the plaintiffs can maintain the present action by reason of the matters set out in paragraphs 56, 58 and 59 of his statement of defence. Paragraph 58A(b) of Lorrain's statement defence states that BMF had sued and obtained judgment in Hong Kong against one of the debtors, CNL in Suit 1983 No. 15133 on July 17, 1984 for the recovery as a debt of the said US$38.5 million and US$1.5 million referred to in the statement of claim. In paragraph 59, Lorrain avers that the plaintiffs' causes of action in respect of the said US$38.5 million and US$1.5 million loans have merged in the Hong Kong judgment.

Mr. Ross-Munro submitted that the plaintiffs cannot obtain judgment against CNL in Hong Kong and at the same time sue Lorrain for judgment on the said sum because those two rights are inconsistent. These inconsistent rights merged into the judgment.

The question is what is the position of the law relating to merger? When a judgment has been given in an action, the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may not be brought on that cause of action. There will be no merger unless the cause of action is the same in both actions: *Halsbury's* Laws of England, 4th Ed. v. 26, p. 274. In *Isaacs & Sons* v. *Salbstein and Another,*[21] Pickford L.J. said, "If the liability is joint, there is only one cause of action, and that becomes merged with the judgment; if the liability is several, there are two causes of action and there is no merger by reason of the judgment." In *Goldrei, Foucard and Son* v. *Sinclair,*[22] the English Court of Appeal held that the plaintiffs were entitled to recover, as there were two causes of action, one against the company for rescission of the agreement and the repayment of the £105, in respect of which fraud was not a necessary element, and the other against both defendants to recover damages for fraud; and that the judgment against the company and the claim for rescission was no bar to the claim against the first defendant for damages for fraud.

In the instant case, the cause of action in the Hong Kong suit was breach of contract. The cause of action against Lorrain in C438 is breach of fiduciary duty. These are two different causes of action. Furthermore the defendants are not the same in the two actions. In the Hong Kong suit the defendant was CNL. In C438 the defendants are Lorrain and three others. In the circumstances the doctrine of merger does not apply in the present case.

For the reasons stated above, I make the following orders:

(i) The applications to strike out the writs and statements of claim in C138 and C438 are dismissed.

(ii) The applications, for stay of proceedings in both civil suits on the ground that the Courts in Hong Kong being the forum of convenience, are dismissed.

(iii) With regard to prayer 2(a) in C438, the law applicable to the substantive matters in issue in these two proceedings is the law of Malaysia.

(iv) I make no order with regard to prayer 2(b)(i) in C438 as Mr. Ross-Munro agreed with my earlier judgment dated September 4, 1986 in respect of this point.

(v) With regard to prayer 2(b)(ii) in C438, the plaintiffs can maintain the present action. The doctrine of merger does not apply in C438.

(vi) Lorrain will pay the plaintiffs the costs of his two applications in C138 and C438.

Order accordingly.

Solicitors: *Skrine & Co.; James Foong & Anand.*

V. R. MENON v. THE GOVERNMENT OF MALAYSIA

[O.C.J. (Ajaib Singh J.) May 8, 1987]

[Kuala Lumpur – Civil Suit No. P 172 of 1984]

Constitutional Law – Pensions – Law restricting additional pension benefits to residents in Malaysia – Whether ultra vires and unconstitutional – Federal Constitution, arts. 4(1), 8(1) & 147 – Indian Constitution, art. 14 – Pensions Adjustment Act 1980, s. 1(2).